No. 15902

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

YOICHI FUJII,

Appellant,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States,

Appellee.

Appeal From the United States District Court for the District of Hawaii.

APPELLANT'S REPLY BRIEF.

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I.

The District Court Had Jurisdiction Over No. 1487. (Reply to Appellee's Point I, pp. 2-7.)

Appellee contends that this court's decision in *Junso Fujii v. Dulles,* 224 F. 2d 906, does not stand for the proposition of law that where the application for passport was filed before the effective date of the 1952 Act but was not denied until after the effective date, the savings clause of the 1952 Act permits the filing of suit thereafter and thus gives the District Court jurisdiction. Appellant contends that it does. A reading of the *Junso Fujii* case can permit of no other conclusion. What appellee is really saying is that *Lew Hsiang v. Brownell,* 234 F. 2d 232 (C. A. 7, 1956), and the dictum in *Young Jin Teung v. Dulles,* 229 F. 2d 244 (C. A. 2, 1956) (both cited by

Appellee, Br. p. 5) represent the correct law and that this court's decision in *Junso Fujii* is incorrect.[1]

One answer to this contention is, of course, that the *Junso Fujii* case is the law in this circuit as expressed by this Court. But an even better answer is that *Junso Fujii* correctly interprets the law and carries out both the intent and the language of the savings clause.

It is true that the *Junso Fujii* complaint was filed before the effective date of the 1952 Act, but this Court said (224 F. 2d at 907) there was jurisdiction in the trial court even if the actual denial did not occur until March 18, 1953, a date after the effective date of the Act. If, as this Court recognized, the administrative proceedings had to be completely finished before the effective date of the 1952 Act, it would set at naught the savings clause which preserved "rights in process of acquisition." Thus to construe the clause would be not only to ignore its plain language and meaning but would contradict the Supreme Court's holding in *United States v. Menasche,* 348 U. S. 528. In that case the Supreme Court said (348 U. S. at 535):

> ". . . The change in the section was designed to extend a savings clause already broadly drawn, and embodies, we believe, congressional acceptance of the principle that the statutory status quo was to continue *even as to rights not fully matured.* . . ." (Italics added.)

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[1]The dictum in *Young Jin Teung* says as much. Appellee's citation of the *Lew Hsiang* case is significant, however, because it recognizes that the conception (albeit, as we say, erroneous) that there must be a final administrative denial before the December 24, 1952 date has reference to the *jurisdiction* of the trial court. If this be so, then, although Appellee refuses to recognize it, a dismissal (as in No. 1300) for lack of finality, cannot be on the merits.

The principle of the *Junso Fujii* case, (application filed before the effective date but not acted upon or completed until after) has been applied in a number of different situations. The *Menasche* case is one. There the declaration of intention was filed before the effective date, but the actual petition for naturalization was filed after.

Other cases are:

Petition of Pringle, 212 F. 2d 787 (C. A. 4, 1954) (same as Menasche);

Yanish v. Barker, 211 F. 2d 467 (C. A. 9, 1954) (rights re bond fixed as of date of deportation proceedings filed before the effective date);

United States ex rel. Zacharias v. Shaughnessy, 221 F. 2d 578 (C. A. 2, 1955) (preliminary application for immigration visa filed before the effective date; not acted upon until after);

In re Carnavus, 155 Fed. Supp. 12 (S. D. N. Y., 1957) (preliminary application for naturalization filed before effective date; petition filed after).

Accordingly the fact that the complaint in the case at bar was not filed until after the effective date is of no significance. Certainly this is true where there is no problem as to the final denial being before the effective date of the 1952 Act. Where this occurs, the right to file suit, and the jurisdiction of the District Court to entertain it is clear. This was so held by the Court of Appeals for the District of Columbia in *Wong Kay Suey v. Brownell,* 227 F. 2d 41 (1955), and in *Dulles v. Richter,* 246 F. 2d 709 (1957). This rule has been accepted and followed by this Court in *Garcia v. Brownell,* 236 F. 2d

356 (1956). Citing the *Wong Kay Suey* case, this Court said (236 F. 2d at 357):

> ". . . (I)t has been judicially declared that where one was excluded from admission to the United States prior to the repeal of Section 503 of the Nationality Act of 1940, his right to have his citizenship determined was preserved by the savings clause contained in the Immigration and Nationality Act of 1952 . . ."[2]

To the same effect are *Frausto v. Brownell,* 140 Fed. Supp. 660 (S. D. Cal. 1956), and *Moy Yee Mon v. Dulles,* 161 Fed. Supp. 924 (E. D. Mich. 1956).

In the light of these cases, embarking up the alley of substantive versus procedural, as appellee would have us do (Br. 4), would not be helpful. In the first place, it is by no means clear that Congress intended any such restrictive interpretation of its very broad language (*cf.* the Supreme Court in *Menasche*), nor is it clear that the right asserted here is merely procedural. Appellant contends, if need be, that the right is substantive. The court in the *Moy Yee Mon* case so held. (161 Fed. Supp. 924, 929.)

Accordingly, the trial court had jurisdiction herein and properly decided that it did. [Supp. Rec.]

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[2]Following this court's decision in the *Garcia* case, the writer of the dictum in *Aure v. United States* (C. A. 9, 1955), 225 F. 2d 88, and the decision in *Matsuo v. Dulles,* 133 Fed. Supp. 711, ruled that the *Wong Kay Suey* rule was the law of this Circuit. (*Kurusomi v. Dulles,* No. 20239, S. D. Cal. Oct. 15, 1956—unreported.)

II.

The Order of the Trial Court Dismissing No. 1300 Is Not Res Judicata. (Reply to Point II, pp. 7-12.)

Appellee engages in fruitless semantics when he says (Br. 7-8) that the dismissal in No. 1300 was for failure to state a claim. It is plain for everyone to see that the basis for the No. 1300 dismissal was for believed lack of jurisdiction. One need not wonder or guess at the basis of the court's ruling.[3]

In the order dismissing No. 1300, the court said that [R. 15, 16]

> "plaintiff has failed to state a claim or cause of action against the defendant upon which relief can be granted, *because at the time the instant suit was filed* the petitioner had not actually been denied a passport or other right or privilege as a national of the United States;" (Italics added.)

This is clearly a ruling on the face of the order for lack of jurisdiction.

But we need not stop with the order itself. In ascertaining the meaning of the order of dismissal this court is entitled to look at the opinion of the trial court.[4] As

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[3]*Mullen v. FitzSimons, etc.*, 172 F. 2d 601, 602, relied upon by appellee (Br. 8) does not support him. The court in that case was not content to look at the bare complaint and motion to dismiss, but examined the whole case to determine what was involved before the district court and what was the effect of the lower court's ruling. In so doing, the court ascertained that appellee misconceived the function of a motion to dismiss. Thus it said (172 F. 2d at 602): "Nor may the absence of common law *jurisdiction* over a contract claim in the absence of diversity of citizenship be used in support of a motion to dismiss for insufficiency." (Italics added.) So here.

[4]In the *FitzSimons* case, *supra*, n. 3, the court ascertained the meaning of the trial court's order from the briefs of counsel.

was said in *Great Lakes Dredge & Dock Co. v. Huffman,* 319 U. S. 293, 295:

> "The formal judgment ordered dismissal of the suit, but it is to be interpreted in the light of the court's opinion, findings, and conclusions of law."

When one examines the written opinion of the trial judge (App. Op. Br. Appx.) it is at once apparent that the dismissal was on jurisdictional grounds and jurisdictional grounds alone and that the trial court (and appellee), just as did the trial court in the *FitzSimons* case, misconceived the function of the motion to dismiss for failure to state a claim. Thus the court, after stating (App. Op. Br. Appx. 2) that "a close scrutiny of the complaint, as amended, justifies the granting of the motion to dismiss," said (*ibid.*):

> "Section 503 of the Nationality Act of 1940, 8 USCA Section 903, *conferred restricted jurisdiction* on the court. To state a Section 503 claim, the complaint must allege that the alleged national was denied a right or privilege . . . Inasmuch as Section 503 was repealed as of December 24, 1952, the complaint must clearly allege that such denial of a right or privilege had occurred prior to that date . . .
>
> ". . . Nothing in the amended complaint definitely shows that plaintiff had been denied a right or privilege as a national of the United States prior to December 23, 1952, the date of action was instituted . . ." (Italics added.)

Is this not, therefore, a ruling that the complaint was being dismissed because of the "restricted jurisdiction" of the court? And is this not a dismissal because of lack of jurisdiction? We believe so and that the court's rulings cannot be otherwise considered.

Having started with the straw man that the dismissal of No. 1300 was for failure to state a claim and not, as we urge as strongly as we can, because of supposed lack of jurisdiction, appellee then goes on to urge (Appellee Br. 8-11) that such a dismissal is on the merits. Appellee relies particularly upon *Billings Utility Co. v. Advisory Committee Board of Governors*, 135 F. 2d 108 (C. A. 8, 1943). But that case is of no utility here. The first case by the Montana court was clearly a decision on the merits, that court holding (135 F. 2d at 109) "the action should be dismissed because, under the Federal Reserve Act, as amended, the bank was under no obligation to make any loan, but the making of loans was discretionary with it." Thus clearly the Montana court went into the merits of the plaintiff's claim. The same cannot be said here. Appellee cannot contend that this Court in No. 1300 went into the question as to whether plaintiff was or was not a citizen.

So too are all the other cases cited by Appellee (Br. 9) of no assistance; the previous cases in all of them were on the merits, most of them being decrees after trial of the facts or on agreed facts.

Nor does Rule 41 (b), Rules of Civil Procedure, either with or without Rule 12 (b) (6) assist appellee. In our opening brief (pp. 14-15) we pointed out that Rule 41 (b) has to do with dismissals of litigation at a time when it had reached the "advanced stage" of trial (*Russo v. Sofia Bros.*, 2 F. R. D. 80 (D. C. May, 1941); 2 Baron & Holtzhoff § 917, p. 635, N. 5); not on preliminary motions in advance of trial. While as to Rule 12 (b) (6), appellee's principle case, in addition to the *Billings* case which we discussed above, is *Mullen v. FitzSimons, etc. Co.*, 172 F. 2d 601 (C. A. 7 1949). But that case, as we previ-

ously pointed out is of interest not because of its dictum statement of the general rule relied upon by appellee, but because it demonstrates that courts will look to substance and not form and determine what a court actually did rather than rely upon label or fiction. In that case the motion was made on the ground of failure to state a claim and the court simply dismissed. This brought into play another rule that it is to be assumed the court dismissed for failure to state a claim. But the Seventh Circuit did not rest on this assumption and examined into the real basis of defendant's motion and, therefore, of the court's ruling. So doing, it properly ruled that the court's decision was not based upon failure to state a claim but rather upon questions concerning the right to invoke the general maritime law and the Jones Act at the same time, whether, in the absence of diversity, one can assert a common law right to maintenance and cure, whether the complaint was simple, concise and direct and whether the complaints traveled on conclusions not admitted by the motions to dismiss. Accordingly, the court said (and its remarks are applicable here) (172 F. 2d at 603):

> "They (the issues presented by defendants' motions to dismiss for failure to state a claim) completely mistake the function of the motion to dismiss."

So here, where the real basis of defendant's motion to dismiss and of the trial court's ruling in granting it, was that the District Court had no jurisdiction because of the lack of a denial prior to the date of the filing of the complaint.

III.

The Dismissal in No. 1300 Is Not Res Judicata. (Reply to Point III, pp. 11-12.)

Appellee is quite mistaken in his appraisal (Br. 11) that there is very little difference, except for mere detail, betwen the complaint in this case [R. 26-30] and the amended and supplemental complaint in No. 1300. [R. 11-12.] This, because appellee completely overlooks the fact that *before* ruling on the motion to dismiss in No. 1300, the court struck [R. 16] certain important and essential allegations, namely the allegations of denial of a right or privilege as a citizen or national of the United States on the ground that plaintiff is not a citizen.[5]

This is an extremely important and significant fact especially in the light of appellee's position in this, a case where "the law and the facts (should) be construed in such a manner as to avoid a loss of citizenship." (*Junso Fujii v. Dulles,* 224 F. 2d 906, 907 (C. A. 9 1955).)[6] The complaint which the court dismissed [R. 16] in No. 1300 was not the same as the complaint in the case at bar. [R. 26-30.] The complaint, after the court had stricken

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[5]The allegation stricken was to the effect that instead of approving plaintiff's application to be registered as a citizen of the United States, "on December 29, 1952, the American Vice Consul at Tokyo executed as to Plaintiff a Certificate of the Loss of the Nationality of the United States on the ground that Plaintiff had lost his United States citizenship by reason of his said service in the Japanese Armed Forces. Said Certificate was approved by the Department of State in Washington, D. C., on July 23, 1953, and sent to the Plaintiff by the said Consular Office on September 25, 1953." [R. 12.]

[6]*Cf. Builders Corp. of America v. United States* (June 6, 1958), 26 U. S. Law Week 2628 (C. A. 9):

> "It is the announced position of the office of the Attorney General that cases against the government will be disposed of on the merits rather than on technical interpretations of the pleadings. . . ."

essential elements, which the court dismissed in No. 1300 was a complaint which did not contain the crucial allegations that plaintiff had been denied by defendant a right or privilege as a citizen or national of the United States on the ground that he was not a national. The complaint, as it stood when the court dismissed it was simply a complaint that alleged [R. 11-12] that plaintiff had applied at the Consular Division of the Embassy in Tokyo to be registered as a citizen of the United States and that the consular officials did not recognize him as a citizen on the day he applied. Such a complaint fails to invoke the jurisdiction of the court. (*Fletes-Mora v. Brownell,* 231 F. 2d 579 (C. A. 9, 1955); *Florentine v. Landon,* 231 F. 2d 452 (C. A. 9, 1955); *Elizarraraz v. Brownell,* 217 F. 2d 829 (C. A. 9, 1954).)

But this essential allegation *was* in the complaint in No. 1487. Accordingly the dismissal in No. 1300 cannot be *res judicata* because it was based upon an entirely different set of facts than in No. 1487. (See discussion in App. Op. Br. 25-27.)

The most, therefore, that the dismissal of No. 1300 can be *res judicata* of is that the court has no jurisdiction where there is no allegation of denial. But that is not this case, because here there is the allegation of denial.

But even if the dismissal of No. 1300 can somehow be twisted into a dismissal for lack of jurisdiction where there is the allegation of denial (an exercise in mental gymnastics which cannot be permitted), appellee's efforts (Br. 12) to distinguish *Brownell v. Tom We Shung,* 352 U. S. 180, must fail. As was pointed out in Appellant's Opening Brief (p. 30), the Government argued the *res judicata* point in *Tom We Shung* but did not convince

the Supreme Court of its validity. Had the point merit, the case would have been decided in the Government's favor for, as pointed out by the Court 352 U. S. 180 at 183), for habeas corpus to lie the alien must be in custody. The alien there was not in custody. So his only remedy was, on the facts of the case, by declaratory judgment. Since that was precisely what he had sought in the previous case, *res judicata,* if a valid argument, should apply.

The fact that the 1952 Act intervened in the *Tom We Shung* case does not serve to distinguish the case; rather does it serve to make the case more applicable here for here too the 1952 Act intervened.

Appellee's suggestion in his conclusion (p. 13) that the judgment of the District Court should be modified to order dismissal for lack of jurisdiction and the suggestion that this will allow appellant the benefits of 8 U. S. C. 1503(b) and (c), is appreciated, but it will not give appellant the protection to which he is entitled.

Appellee has since 1948 [R. 28] contested appellant's assertion of citizenship.[7] Since February 11, 1953 [R. 6-7] appellee has interposed every technical objection possible to avoid a decision on the merits. In the case at bar, appellee took the position, and takes it now, that the dismissal in No. 1300 was on the merits and is *res judicata.* This was an affirmative defense. It did not go to the jurisdiction of the Court. It did not have to be raised and unless affirmatively raised, the defense of *res judicata* would not have been available. (Rule 8(c), Federal Rules of Civil Procedure; *United States v. One 1946 Plymouth,*

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[7]A position which on the merits, if they can ever be reached, is undoubtedly unsound. (*Nishikawa v. Dulles,* 356 U. S. 129, 2 L. Ed. 2d 659.)

167 F. 2d 3, 8 (C. A. 7, 1948).) Since appellee argues so vigorously in this proceeding that the dismissal in No. 1300 was on the merits and is *res judicata,* appellant, unless the judgment of this court shows clearly to the contrary, will have no assurance that the same position will not be taken in an 8 U. S. C. 1503 proceeding. Appellant is entitled to protection in such a proceeding at the minimum.

Obviously, of course, this is not to suggest that appellant believes his arguments calling for outright reversal are not well taken. Quite the contrary is the case.

Conclusion.

The judgment should be reversed and appellant given his day in court on the merits.

Respectfully submitted,

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